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Supreme Court of the United States

OCTOBER TERM, 1940.

No. 253.

EUGENE HIGGINS,
Petitioner,

vs.

GUY T. HELVERING, Commissioner of Internal Revenue,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FOR REHEARING.

SELDEN BACON,
ORWILL V. W. HAWKINS,
Counsel for Petitioner.

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Petition for Rehearing.

The above-named petitioner respectfully prays a rehearing of the above-entitled cause, for that in its opinion in this cause, filed herein on February 3, 1941, the Court has inadvertently been misled into stating that:

> "No regulation has ever been promulgated which interprets the meaning of 'carrying on a business.'"

and into, concluding therefrom that the repeated rulings of the Board of Tax Appeals and the acquiescences therein of the Commissioner of Internal Revenue, and repeated decisions of the United States District Courts and Circuit Courts of Appeal are not determinative and do not amount to settled administrative practice, and that "it should not "be assumed, from rulings of this class that Congressional "re-enactment of the language which they construed was "an adoption of their interpretation."

The attention of the Court is respectfully called to the following *regulations* approved by the Secretary of the Treasury in February, 1918:

"*Art. 8. Trade in the case of individuals.*

"In the case of an individual the terms 'trade,' 'business,' and 'trade or business' comprehend all his activities for gain, profit, or livelihood, entered into with sufficient frequency, or occupying such portion of his time or attention as to constitute a vocation, including occupations and professions. When such activities constitute a vocation they shall be construed to be a trade or business whether continuously carried on during the taxable year or not, and all the income arising therefrom shall be included in his return for excess-profits tax.

"In the following cases the gain or income is not subject to excess profits tax, and the capital from which such gain or income is derived shall not be included in 'invested capital'; (a) Gains or profits from transactions entered into for profit, but which are isolated, incidental, or so infrequent as not to constitute an occupation, and (b) the income from property arising merely from its ownership, including interest, rent and similar income from investments except in those cases

in which the management of such investments really constitutes a trade or business."

Regulations No. 41, Art. 8, (signed by the Commissioner and approved by the Secretary of the Treasury and released for publication on February 4, 1918).

It is true that "Regulations No. 41 was expressly made relative to the War Excess Profits Tax"; but the War Excess Profits Tax was imposed on the net income, (with some specified exemptions), determined under the provisions of the Income Tax Act.

The War Excess Profits Tax Act of October 3, 1917 was Title 2 of the Revenue Act of that year. Title 1 of that Revenue Act was the Income Tax Law.

By Section 200 of that Title 2, it was specifically provided that:

"The terms 'trade' and 'business' include professions and occupations."

By Section 201 of that Title 2, it was provided:

"That in addition to the taxes under existing law and under this Act there shall be levied, assessed, collected, and paid for each taxable year upon the income of every corporation, partnership, or individual, a tax (hereinafter in this title referred to as the tax) equal to the following percentages of the net income:"

By Section 206 of that Act, it was provided that:

"The net income of a partnership or individual shall be ascertained and returned for the calendar years nineteen hundred and eleven, nineteen hundred

and twelve, and nineteen hundred and thirteen and for the taxable year upon the same basis and in the same manner as provided in Title I of such Act of September eighth, nineteen hundred and sixteen as amended by this Act, except that the credit allowed by subdivision (b) of section five of such Act shall be deducted."

Title 1 of the Act of September 8, 1916 was the Income Tax Law.

Section 213 of that Title 2 provided for the making of Regulations by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury.

It was thus specifically provided that the taxable net income under the Excess Profits Tax law should be based on the net income as ascertained under the Income Tax Law, and the Regulations as to what should constitute a trade or business of which the expenses were deductible were thus made directly applicable to the section of the Income Tax Act permitting such deductions as are here in question.

The re-enactment of the Income Tax Law, in the 1918 form, in which Section 214 (a) took its present form, occurred about a year after the publication of this Art. 8 of Regulations 41.

The principle thus declared in this Regulation runs through all the decisions of the Board of Tax Appeals and of the United States District and Circuit Courts of Appeals on the construction of the term "carrying on any trade or business", up to the decision of the Board of Tax Appeals in the case at bar.

We have examined the briefs filed in behalf of the Commissioner in the Circuit Court of Appeals in the three

cases referred to by this Court, namely, the *Kales* case, 101 F. (2d) 35; *Foss* v. *Commissioner,* 75 F. (2d) 326 and *Washburn* v. *Commissioner,* 51 F. (2d) 949.

Aside from the fact that these briefs are but arguments of counsel, and not even rulings of the Commissioner, in no one of them do we find the bald proposition asserted that no amount of activities on the part of a taxpayer, however continuous, in managing his own securities could be deemed "carrying on business".

The nearest to assertion of this proposition appears in the brief on behalf of the Commissioner in the Circuit Court of Appeals, in the case of *Washburn* v. *Commissioner,* (in 1931), but the contention was there advanced concerning the construction of Section 204 (a), a separate enactment, and it was, in that brief, claimed that the construction to be given to the wording of that section, was different from that to be given to the expression in Section 18.

In the brief in *Foss* v. *Commissioner,* 75 F. (2d) 326, (in 1934) we have found no such contention.

In the brief in *Kales* v. *Commissioner,* 101 F. (2d) 35, (in 1938) counsel for the Commissioner (abandoning the contention that had been made in *Washburn* v. *Commissioner,* 51 F. (2d) 949), asserted that Section 204 (a) and 18 should be governed by like construction of the term "carrying on business".

In each of the three cases, the contentions actually advanced by counsel for the Commissioner were overruled by the Court.

All the decisions and rulings throughout the years, up to 1934, are clearly based on the principle embodied in this Regulation, Article 8 of Regulations 41; which has been so overlooked, but which principle we had deduced from the rulings and decisions themselves.

We may also be permitted to point out that the Court seems to have overlooked one fact shown in the Record, namely,—that the Commissioner's ruling on the 1932 return of the petitioner, before the case came before the Board of Tax Appeals, was that the petitioner was carrying on a single business in managing both his real estate and his securities (R. p. 21). The Commissioner then sought to divide the entire expenses of the petitioner's business in proportion to the amount of income derived respectively from taxable property and from non-taxable securities (R. p. 21). It was when the Board of Tax Appeals ruled that such division of the expenses was impossible (R. p. 84) that the Commissioner asserted the claim that the taxpayer's management of his own securities could not be held to be carrying on business, no matter how continuous and varied the petitioner's activities.

As the decision of this Court was largely based on the proposition that no Regulation has ever been promulgated which interprets the meaning of "carrying on a business", and the conclusion therefrom that the repeated decisions were, therefore, not determinative and did not amount to settled administrative practice; and that consequently Congressional re-enactment of the language of Section 214, a (in later acts Section 18) was not to be regarded as an adoption of that interpretation; it is respectfully sub-

mitted that this petition for a reargument should be granted in view of the overlooked Article 8 of Regulations No. 41 of February, 1918.

In view of that Article 8 of Regulations 41, it is also clear, as pointed out under Point I, A and B of our main brief, that the finding that the petitioner was not engaged in carrying on business in the management of his securities was a finding of mixed law and fact, and both by the Board of Tax Appeals and by the Circuit Court of Appeals based on an erroneous view of the law, as established and recognized by the Congress in its re-enactments, and so reviewable.

Respectfully submitted,

SELDEN BACON,
ORWILL V. W. HAWKINS,
Counsel for Petitioner.

We hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

SELDEN BACON,
ORWILL V. W. HAWKINS,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES.

No. 253.—October Term, 1940.

Eugene Higgins, Petitioner,
vs.
Commissioner of Internal Revenue.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[February 3, 1941.]

Mr. Justice Reed delivered the opinion of the Court.

Petitioner, the taxpayer, with extensive investments in real estate, bonds and stocks, devoted a considerable portion of his time to the oversight of his interests and hired others to assist him in offices rented for that purpose. For the tax years in question, 1932 and 1933, he claimed the salaries and expenses incident to looking after his properties were deductible under Section 23(a) of the Revenue Act of 1932.[1] The Commissioner refused the deductions. The applicable phrases are: "In computing net income there shall be allowed as deductions: (a) *Expenses.*—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business . . . ." There is no dispute over whether the claimed deductions are ordinary and necessary expenses. As the Commissioner also conceded before the Board of Tax Appeals that the real estate activities of the petitioner in renting buildings[2] constituted a business, the Board allowed such portions of the claimed deductions as were fairly allocable to the handling of the real estate. The same offices and staffs handled both real estate and security matters. After this adjustment there remained for the year 1932 over twenty and for the year 1933 over sixteen thousand dollars expended for managing the stocks and bonds.

Petitioner's financial affairs were conducted through his New York office pursuant to his personal detailed instructions. His residence was in Paris, France, where he had a second office. By cable, telephone and mail, petitioner kept a watchful eye over his securities. While he sought permanent investments, changes, redemptions, maturities and accumulations caused limited shiftings in his port-

[1] 47 Stat. 169, c. 209.

[2] Cf. Pinchot v. Commissioner, 113 F. (2d) 718.

folio. These were made under his own orders. The offices ke
records, received securities, interest and dividend checks, made d
posits, forwarded weekly and annual reports and undertook ge
erally the care of the investments as instructed by the owner. Pu
chases were made by a financial institution. Petitioner did not pa
ticipate directly or indirectly in the management of the corporatio
in which he held stock or bonds. The method of handling h
affairs under examination had been employed by petitioner for mo
than thirty years. No objection to the deductions had previous
been made by the Government.

The Board of Tax Appeals[3] held that these activities did not co
stitute carrying on a business and that the expenses were capab
of apportionment between the real estate and the investments. Th
Circuit Court of Appeals affirmed,[4] and we granted certiorari b
cause of conflict.[5]

Petitioner urges that the "elements of continuity, constant rep
tition, regularity and extent" differentiate his activities from t
occasional like actions of the small investor. His activity is an
the occasional action is not "carrying on business." On the oth
hand, the respondent urges that "mere personal investment activ
ties never constitute carrying on a trade or business, no matter ho
much of one's time or of one's employees' time they may occupy."

Since the first income tax act, the provisions authorizing busine
deductions have varied only slightly. The Revenue Act of 191
allowed as a deduction "the necessary expenses actually paid
carrying on any business." By 1918 the present form was fixed an
has so continued.[7] No regulation has ever been promulgated whi
interprets the meaning of "carrying on a business," nor any ru
ings approved by the Secretary of the Treasury, i.e., Treasury D
cisions.[8] Certain rulings of less dignity, favorable to petitioner
appeared in individual cases but they are not determinative.

[3] 39 B. T. A. 1005.

[4] 111 F. (2d) 795.

[5] Kales *v.* Commissioner, 101 F. (2d) 35; duPont *v* Deputy, 103 F. (2d) 25

[6] 38 Stat. 167, Section II B.

[7] 40 Stat. 1066, Sec. 214(a)(1).

[8] Cf. Helvering *v.* New York Trust Co., 292 U. S. 455, 467-468.

[9] O. D. 537, 2 C. B. 175 (1920); O. D. 877, 4 C. B. 123 (1921); I. T. 275
XIII-1 C. B. 43 (1934). See also 1934 C. C. H. Federal Tax Service, Vol.
¶ 6035, p. 8027.

[10] Biddle *v.* Commissioner, 302 U. S. 573, 582. Cf. Estate of Sanford
Commissioner, 308 U. S. 39, 52. But see Helvering *v.* Bliss, 293 U. S. 144, 15
and McFeely *v.* Commissioner, 296 U. S. 102, 108.

Even acquiescence[11] in some Board rulings after defeat does not amount to settled administrative practice.[12] Unless the administrative practice is long continued and substantially uniform in the Bureau and without challenge by the Government in the Board and courts, it should not be assumed, from rulings of this class, that Congressional reenactment of the language which they construed was an adoption of their interpretation.

While the Commissioner has combated views similar to petitioner's in the courts, sometimes successfully[13] and sometimes unsuccessfully,[14] the petitioner urges that the Bureau accepted for years the doctrine that the management of one's own securities might be a business where there was sufficient extent, continuity, variety and regularity. We fail to find such a fixed administrative construction in the examples cited. It is true that the decisions are frequently put on the ground that the taxpayer's activities were sporadic but it does not follow that had those activities been continuous the Commissioner would not have used the argument advanced here, i.e., that no amount of personal investment management would turn those activities into a business. Evidently such was the Government's contention in the *Kales* case,[15] where the things the taxpayer did met petitioner's tests, and in *Foss* v. *Commissioner*[16] and *Washburn* v. *Commissioner*[17] where the opinions turned on the extent of the taxpayer's participation in the management of the corporations in which investments were held.[18]

Petitioner relies strongly on the definition of business in *Flint* v. *Stone Tracy Company*.[19] "'Business' is a very comprehensive term and embraces everything about which a person can be employed." This definition was given in considering whether certain corpora-

11 Kissel *v.* Commissioner, 15 B. T. A. 1270, acquiesced in VIII-2 C. B. 28 (1929); Croker *v.* Commissioner, 27 B. T. A. 588, acquiesced in XII-1 C. B. 4 (1933).

12 Higgins *v.* Smith, 308 U. S. 473, 478-479.

13 Bedell *v.* Commissioner, 30 F. (2d) 622, 624; Monell *v.* Helvering, 70 F. (2d) 631; Kane *v.* Commissioner, 100 F. (2d) 382.

14 Kales *v.* Commissioner, 101 F. (2d) 35; duPont *v.* Depr't, 103 F. (2d) 257, 259, reversed on other grounds, 308 U. S. 488.

15 Kales *v.* Commissioner, 34 B. T. A. 1046, 101 F. (2d) 35.

16 75 F. (2d) 326.

17 51 F. (2d) 949, 953.

18 Cf. Roebling *v.* Commissioner, 37 B. T. A. 82; Heilbroner *v.* Commissioner, 34 B. T. A. 1200.

19 220 U. S. 107, 171.

tions came under the Corporation Tax law which levies a tax on corporations engaged in business. The immediate issue was whether corporations engaged principally in the "holding and management of real estate"[20] were subject to the act. A definition given for such an issue is not controlling in this dissimilar inquiry.[21]

To determine whether the activities of a taxpayer are "carrying on a business" requires an examination of the facts in each case. As the Circuit Court of Appeals observed, all expenses of every business transaction are not deductible. Only those are deductible which relate to carrying on a business. The Bureau of Internal Revenue has this duty of determining what is carrying on a business, subject to reexamination of the facts by the Board of Tax Appeals[22] and ultimately to review on the law by the courts on which jurisdiction is conferred.[23] The Commissioner and the Board appraised the evidence here as insufficient to establish petitioner's activities as those of carrying on a business. The petitioner merely kept records and collected interest and dividends from his securities, through managerial attention for his investments. No matter how large the estate or how continuous or extended the work required may be, such facts are not sufficient as a matter of law to permit the courts to reverse the decision of the Board. Its conclusion is adequately supported by this record, and rests upon a conception of carrying on business similar to that expressed by this Court for an antecedent section.[24]

The petitioner makes the point that his activities in managing his estate, both realty and personalty, were a unified business. Since it was admittedly a business in so far as the realty is concerned, he urges, there is no statutory authority to sever expenses allocable to the securities. But we see no reason why expenses not attributable, as we have just held these are not, to carrying on business cannot be apportioned. It is not unusual to allocate expenses paid for services partly personal and partly business.[25]

Affirmed.

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[20] *Id.* 169.

[21] Cohens *v.* Virginia, 6 Wheat. 264, 399; Puerto Rico *v.* Shell Co., 302 U. S. 253, 269.

[22] Revenue Act of 1932, 47 Stat. 169, § 272; Internal Revenue Code, § 272.

[23] Internal Revenue Code, § 1141.

[24] Van Wart *v.* Commissioner, 295 U. S. 112, 115.

[25] 3 Paul & Mertens, Law of Federal Income Taxation § 23.65; cf. National Outdoor Advertising Bureau *v.* Helvering, 89 F. (2d) 878, 881.